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IN THE

Supreme Court of the United States

October Term 1939.
No. 62

ELECTRO-CHEMICAL ENGRAVING CO. INC.,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

BERNARD S. BARRON,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Electro-Chemical Engraving Co. Inc., shows to the court as follows:

STATEMENT.

This is a petition for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit entered on April 3rd, 1940 (p. 71) reversing a decision of the United States Board of Tax Appeals.

STATEMENT OF THE CASE.

The Commissioner of Internal Revenue, on March 15, 1939, determined a deficiency against the petitioner

for its income and excess profits taxes ($14,035.71 and $2,547.08 respectively) for the calendar year of 1935. The petitioner on May 19, 1939 petitioned the United States Board of Tax Appeals for a redetermination of the deficiency. The Board of Tax Appeals on June 16, 1939 decided in favor of the petitioner. Thereupon the Commissioner petitioned the United States Circuit Court of Appeals for the Second Circuit to review the decision of the United States Board of Tax Appeals. The Circuit Court of Appeals for the Second Circuit on March 18, 1940, in a written opinion, reversed the decision of the Board of Tax Appeals (pp. 66-70).

The Facts.

The facts in this case, as stipulated (pp. 32-36), are briefly as follows:

The petitioner is a corporation organized under the laws of the State of New York. The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States. The petitioner filed its income and excess profits tax return for the calendar year 1935 with the Collector of Internal Revenue for the Third District of New York. In that return petitioner deducted a loss of $101,077.44, resulting from the foreclosure of its factory property. The Commissioner of Internal Revenue refused to allow this deduction, contending that the loss was limited to $2,000 by Section 117(d) of the Revenue Act of 1934. The Board of Tax Appeals held that this was not a "sale or exchange" within the meaning of the Revenue Act and allowed the loss in full.

The Question Involved.

Did the loss suffered by the petitioner through the foreclosure of its real property and the extinguishment of its equity therein result from a sale or exchange within the meaning of Section 117(d) of the Revenue Act of 1934?

Reasons for Granting the Writ.

1. The decision below is in direct conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit, in *Commissioner of Internal Revenue* v. *Freihofer,* 102 F. (2d) 787 (March 15, 1939) and in similar conflict with the decision of the United States Circuit Court of Appeals for the Sixth Circuit, in *Commissioner of Internal Revenue* v. *Hammel,* 108 F. (2d) 753 (January 10, 1940). The Solicitor General did not apply for a writ of certiorari in *Commissioner* v. *Freihofer* and the time in which to make such application has expired. On April 10, 1940, the Solicitor General applied to this Court for a writ of certiorari in the *Hammel* case. The application has not as yet been acted on by this court.

2. The Circuit Court has decided an important question of federal law which has not been, but should be, settled by this court. The statute involved (Sec. 117(d) of the Revenue Act of 1934) has not yet been before this Court for construction. The same section (identically numbered) is found in the Revenue Act of 1936 and the Revenue Act of 1938. The decision below, in the instant case, is of far reaching importance in that it will hereafter continue to affect the income tax liability of taxpayers who suffer losses as a consequence of foreclosure proceedings.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this honorable court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this court on a day designated for its review and determination, a full and complete transcript of the record and full proceedings in said Circuit Court of Appeals had in the case No. 221 and entitled "Commissioner of Internal Revenue, petitioner, vs. Electro-Chemical Engraving Co. Inc., respondent" to the end that said case may be reviewed and determined by this court as provided by law; that the determination of the United States Circuit Court of Appeals for the Second Circuit, may be reversed, and that your petitioner may have such other and further relief as may be just.

ELECTRO-CHEMICAL ENGRAVING CO. INC.,
By BERNARD S. BARRON,
Counsel for the Petitioner.

IN THE

Supreme Court of the United States

October Term, 1939.

No.

ELECTRO-CHEMICAL ENGRAVING CO. INC.,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The memorandum opinion of the Board of Tax Appeals is printed at pages 18-20 of the record and is not officially reported. The opinion of the Circuit Court is printed at pages 66-70 of the record and is not yet officially reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 3rd, 1940 (p. 71). Jurisdiction is conferred upon this Honorable Court by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of Case.

The facts have been set forth in the petition (p. 2).

Specification of Error.

The Circuit Court erred in holding that the divestiture of the taxpayer's property and the extinguishment of his equity therein by the decree of foreclosure was a "sale" within the meaning of Section 117(d) of the Revenue Act of 1934.

The Statutes Involved.

Revenue Act of 1934, C. 277, 48 Stat. 680; Sec. 23. Deductions from gross income.

"In computing net income there shall be allowed as deductions: * * *

(f) Losses by Corporations.—In the case of a corporation, the losses sustained during the taxable year and not compensated for by insurance or otherwise."

Revenue Act of 1934 (U. S. C., Title 26, seq. 111):

"Section 117, Capital Gains and losses:

* * *

(d) Limitation on capital losses.—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2000. plus the gains from such sales or exchanges * * *."

Argument.

The decision below, in direct conflict with decisions of the Circuit Courts in the Third and Sixth Circuits, involves an important question of Federal Law which has not yet been, but should be, settled by this court.

In *Commissioner* v. *Freihofer,* 102 F. (2d) 787, the taxpayer's mortgaged property was sold by the sheriff under an execution writ issued in a Pennsylvania statutory foreclosure proceeding. The taxpayer claimed the right to deduct the entire amount of his loss (in excess of $2000.) under Section 23(f) of the Revenue Act of 1934. The Circuit Court for the Third Circuit decided that a foreclosure sale was an involuntary sale; that Section 117(d) contemplated only *voluntary* sales; and that the taxpayer was therefore entitled to deduct his loss in full under Section 23(f) of the Revenue Act of 1934. It expressly ruled (p. 790):

> "* * * that the sales of capital assets referred to in Section 117 are those sales only which are voluntarily made by a taxpayer and that judicial sales made by the sheriff in execution of a judgment in a proceeding for the foreclosure of a mortgage given by a prior owner are not included."

In *Commissioner* v. *Hammel,* 108 F. (2d) 753, the taxpayers' property was foreclosed and the sheriff, pursuant to the foreclosure decree, sold the property at public auction. The taxpayers deducted the entire loss incurred as a consequence of the foreclosure. The Circuit Court of Appeals for the Sixth Circuit, in sustaining the deduction, said:

> "The respondents in the case at bar were not

parties to the sheriff's sale and neither contracted for nor consented to it and received no part of the consideration. They were deprived of their interest in the property not by sale but by an adverse judicial proceeding which completely extinguished their title without consideration. The foreclosure was the identifiable event which established their loss. However, it was not established by a sale as that word is used in Section 117 of the Revenue Act of 1934. *Commissioner of Internal Revenue* v. *Freihofer,* 3 Cir., 102 F. (2d) 787; *Burnet* v. *Harmel,* 287 U. S. 103, 107, 53 S. Ct. 74, 77 L. Ed. 199; *Hale* v. *Helvering,* 66 App. D. C. 242, 85 F. (2d) 819."

In the instant case, on identical facts, the Circuit Court of Appeals for the Second Circuit held that the divestment of title by foreclosure *was* a sale, and declined to follow the foregoing decisions. It said:

"The respondent relies on the decision in *Commissioner* v. *Freihofer, supra,* and that of the Sixth Circuit in *Commissioner* v. *Hammel,* 108 Fed. (2d) 753, to negative the Commissioner's ruling that the case at bar is governed by Section 117(d).

"We feel compelled to differ with the foregoing decisions and to hold that Section 117(d) applies to the present case and precludes the allowance of a deduction of more than $2000." (Italics ours.)

The irreconcilable conflict between the Second and the Third and Sixth Circuits is thus apparent.

Numerous cases have been decided by the Board of Tax Appeals involving the construction of Section

117(d) of the Revenue Act of 1934, with reference to foreclosure losses, all favorable to the taxpayer.[1] Numerous cases involving the same question are now pending there and in the Circuit Courts.[2] Section 117(d) of the Revenue Act of 1934 is repeated in identical language in the Revenue Acts of 1936 and 1938. It is reasonable to assume, therefore, that numerous cases will continue to come before the Board with consequent confusion because of the conflict in the Circuits. It is important that this vital question should be determined by this Court; otherwise, tax liability will be dependent not on a uniform rule of interpretation of the Revenue Act, but on the residence of the taxpayer in a particular judicial circuit.

CONCLUSION.

In order that the conflict of the decision below with the decisions of the Circuit Courts for the Third and Sixth Circuits may be resolved, and in order that the important question involved in the application of the tax laws may be settled by this court, it is submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

BERNARD S. BARRON,
Counsel for Petitioner.

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[1] *Watson* v. *Commissioner*, 27 B. T. A. 463;
Hawkins v. *Commissioner*, 34 B. T. A. 139;
Commonwealth v. *Commissioner*; 36 B. T. A. 850;
Warfield v. *Commissioner*, 38 B. T. A. 907;
Rust v. *Commissioner*, 38 B. T. A. 910 (and others).

[2] *Coggan* v. *Commissioner* now pending C. C. A. 1st Circuit;
Hill v. *Commissioner* now pending C. C. A. 6th Circuit;
Bookstein v. *Commissioner* now pending C. C. A. 6th Circuit;
Nebraska Bridge Supply & Lumber Co. v. *Commissioner* now pending C. C. A. 8th Circuit;
Jones v. *Commissioner* now pending C. C. A. 8th Circuit.